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ABSTRACT

For many students in the 1990s, school is no longer a safe environment in which they feel free to learn. This brief is intended to dispel myths about peer sexual harassment and clarify the new realities of the phenomenon in schools. The brief also conveys the message that school administrators have a duty to foster a school environment based on mutual respect and to adopt a "no tolerance" policy toward harassment, sexual or otherwise. The brief outlines steps for recognizing peer sexual harassment (by deconstructing nine myths and explaining conditions under which schools will be held liable); preventing peer sexual harassment (by developing a comprehensive school policy); and enforcing the rules (by setting out the components of a model policy--investigation, documentation, and followup). (Contains 58 endnotes.) (LMI)

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A Legal Memorandum

SEPTEMBER 1997 *National Association of Secondary School Principals* ISSN 0192-6152

STUDENT-TO-STUDENT SEXUAL HARASSMENT IN SCHOOLS

Old Myths, New Realities

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INTRODUCTION

Changing Responsibilities in Changing Times

Do you remember the "good old days"? I do. I recall being a young student excited about going to school each day. Back then, I think my biggest concern was what to wear, or whether my teacher would assign too much homework. Sure, I was occasionally bothered or teased by classmates; but I, like many of my peers, chalked it up to "growing pains" and still found school a safe place to be.

Fast forward to the 1990s. For too many students, school is no longer a safe environment where they feel free to learn. These students often dread a day at school where they worry about being harassed or discriminated against by fellow students in ways that severely interfere with their ability to get an education. Times have changed.

> *...Schools should, if necessary, be islands of tolerance where those whose customs, traditions, and ideas might subject them to derision elsewhere can find refuge. A...school must mobilize itself in fierce opposition to those who engage in such vile activities as race baiting, gay bashing, swastika daubing, or sexual harassment.*
>
> ***Breaking Ranks: Changing an American Institution***

Today, the mistreatment by peers that some students encounter in school has transcended the "innocent" teasing that many of us dismissed so easily in our youth. This new breed of peer harassment is now the subject of various lawsuits against schools, districts, and administrators, who continue to use old approaches to solve new problems. Students and parents are demanding that educational institutions be free of discrimination, and that administrators take complaints of student-to-student sexual harassment seriously. And have no doubt, many state and federal courts, the U.S. Department of Education, and education lobbyists across the country are in agreement.

This *Legal Memorandum* is intended to dispel old myths about peer sexual harassment and bring to light the new realities of the phenomenon in schools. Additionally, it is intended to convey the message that, as school administrators, it is your duty to foster a school environment filled with mutual respect and understanding, and to adopt a "no tolerance" policy toward harassment, sexual or otherwise.

RECOGNITION

The First Step in the Process

For those of us who grew up believing that "boys will be boys," recognizing sexual harassment, as it is defined today, can be an elusive task. Once you understand what sexual harassment is and what your legal responsibilities are, however, preventing and possibly eliminating the problem becomes easier.

A Definition

Sexual harassment consists of unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when made by a member of the school staff to a student, or to another staff member, or when made by a student to another student.[1] Generally speaking, there are two classifications of harassment that courts have recognized: quid pro quo harassment; and hostile environment harassment.

Quid pro quo harassment occurs where:

- Submission to or rejection of such conduct is made, whether explicitly or implicitly, a term or condition of an individual's status in a course, program, or activity
- Submission to or rejection of such conduct is used as a basis for academic decisions affecting the individual, including but not limited to grade or academic progress.[2]

Hostile environment harassment occurs where:

- Such conduct has the purpose or effect of substantially interfering with an individual's academic performance, or of creating an intimidating, hostile, or offensive educational environment.[3]

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In addition to these categories of harassment, courts have acknowledged that student-to-student (peer) sexual harassment can be a form of discrimination prohibited by Title IX.[6]

Dispelling Old Myths

Armed with this definition, it is important to separate the myths from the realities of behavior that constitutes sexual harassment.

Myth: Only females can be the victims of sexual harassment.

Reality: Sexual harassment does not always revolve around females. Males can easily be victims, just as females can be perpetrators.

Myth: Same sex harassment is not really sexual harassment.

Reality: Harassment is not always carried out by a person whose sex is opposite from that of the victim's. Same sex sexual harassment (female against female, male against male) is still sexual harassment.[7]

Myth: Sexual harassment usually takes place in private.

Reality: Sexual harassment does not always take place in private. Rather, sexual harassment in schools is frequently a "public act," especially in peer situations.[8]

Myth: Harassment of gay and lesbian students because of their sexual preference is not prohibited by law.

Reality: Although federal law does not specifically prohibit discrimination based on sexual preference, some instances of sexual preference harassment, directed at gay or lesbian individuals, can rise to the level of sexual harassment prohibited by Federal Law.[9] (Last year, Jamie Nabozny, a 21-year-old gay man, won a substantial out-of-court settlement against three school principals. Because of his sexual preference, Nabozny suffered years of physical beatings and torment at the hands of classmates in a Wisconsin high school. In this landmark case, the Federal Court of Appeals for the 7th Circuit held the principals individually liable for failing to protect Jamie from the harassment.[10])

Myth: A student who doesn't complain or who otherwise accepts or submits to harassment must have welcomed the behavior.

Reality: A student's failure to complain does not make harassing behavior welcome.[11] A student may fear retaliation, or believe that filing a complaint may make matters worse. Additionally, a student's acquiescence in an instance of harassment does not mean that the student has welcomed the conduct. A student's acceptance of certain treatment should not be taken to mean that the student did not mind, or invited the harassment.[12]

Myth: All behavior with sexual or physical connotations is illegal sexual harassment.

Reality: "Not all behavior with sexual connotations constitutes sexual harassment under Federal law. The behavior must be sufficiently severe, persistent, or pervasive that it adversely affects a student's education, or creates a hostile or abusive educational environment."[13]

Myth: A "one time" incident can never be sexual harassment.

Reality: Usually, a one time incident does not rise to the level of sexual harassment. For instance, a kiss on the cheek from a first grade boy to a first grade girl, though inappropriate conduct under some school codes, standing alone does not rise to the level of sexual harassment.[14] However, a single severe incident such as sexual assault does rise to the level of sexual harassment.[15] As a general rule, "the more severe the conduct, the less the need to show a repetitive series of incidents, particularly when the harassment is physical."[16]

Myth: For a hostile environment to exist, there must be some tangible injury to the student (e.g., falling grades, inability to participate in school activities).

Reality: No tangible injury is required for a hostile environment to exist.[17] Although a number of cases involve falling grades or inability to participate in school activities, this is not a prerequisite for a hostile environment claim. Individual students cope differently with harassment. In addition, many of the effects of harassment do not manifest themselves in a visible way.

Myth: A school cannot be held liable for the actions of harassing students.

Reality: "Title IX does not make a school responsible for the actions of harassing students, but instead holds a school liable for its own discrimination in failing to remedy the harassment once the school has notice."[18]

Liability

The reality regarding liability is particularly important in light of recent litigation in which courts have found schools, and sometimes individual administrators, liable for failing to protect students from peer sexual harassment. Notably, there is a differ-

ence in opinion between the U.S. Federal Courts of Appeals and the U.S. Department of Education concerning a school's liability for failing to remedy harassment, and what constitutes notice of harassment.

For example, the Federal Court of Appeals for the 5th Circuit covering Louisiana, Mississippi, and Texas, recently held that a school can only be liable if the school treats sexual harassment claims of boys and girls differently.[7] In another 5th Circuit opinion, the Federal Court of Appeals adopted the view that schools cannot be held liable unless a management level employee is informed of the harassment.[8] Unfortunately, the Supreme Court has recently added to the confusion by declining to review these holdings.

Notwithstanding this uncertainty, under the U.S. Department of Education approach, a school will be held liable if:

1. Students harass other students.
2. The school has notice of the harassment.
3. The school fails to take immediate and appropriate corrective action.[9]

Notice

Notice of sexual harassment can be either actual or constructive.

Actual Notice

A victim can notify "any agent or other responsible employee through a formal or information complaint, a third party, or by contacting other appropriate personnel (i.e., principal, bus driver, teacher, etc)."[10]

Constructive Notice

Constructive notice has been afforded when the school or administrator knew or should have known of the harassment.[11] Thus, "if the school would have found out about the harassment through a reasonably diligent inquiry, then the school has constructive notice," and can be held liable for failing to take corrective action.[12]

PREVENTION

The Best Weapon

Once you have a handle on what sexual harassment is, and understand your obligations to police this behavior among students, a comprehensive policy against sexual harassment and discrimination can be an invaluable preventive tool. In fact, federal law requires that at least a non-discrimination policy be in place,[13] and the Office for Civil Rights (OCR) strongly suggests that a separate mechanism be in place for resolving peer sexual harassment complaints.[14]

LAYING THE FOUNDATION FOR THE SCHOOL'S POLICY

Adopt a "No Tolerance" Philosophy About Harassment

If you choose to maintain a separate policy governing peer sexual harassment, it is a good idea to first develop a convincing and effective philosophy about the problem. As mentioned previously, a "no tolerance" approach to all forms of discrimination and harassment, applicable to all persons in your school, should underlie the policy. This is important, as the consequences of continued harassment for both students and administrators can be extreme.

The focus in developing a policy should be on prevention, intervention, and the use of good judgment and common sense. Last, but not least, your legal duty to protect students in your school from harassment, and to make school a safe environment where learning can take place, should be your steady guide in the process.

Build a Framework for Policy Implementation

As a preliminary approach, distribution of an age appropriate survey may be a good way to help you determine the extent and causes of the problem at your school.[15] You might be surprised at the large numbers of students who may report having been harassed.[16] Commit to providing training for both students and staff, and work hard to collaborate with parents. You will also need to designate a Title IX coordinator, whose job it will be to explain the policy to anyone who may have questions.[17] Finally, set up a plan to publish and distribute the policy to parents and students.[18] To accomplish this, you may want to make copies available at various locations throughout the school, or include the policy in major school publications.[19]

ENFORCEMENT

The Key to Elimination

Prevention, though an important weapon in the battle against sexual harassment, is only part of the process. Having a strong policy in place will help to educate students and parents, but a policy that is not properly enforced is no policy at all. In fact, in a suit brought against a school or school district for failure to protect students from harassment, the question will always be whether the school action taken in response to the complaint was actually effective.[20]

COMPONENTS OF A MODEL POLICY

Investigation, Documentation, and Follow-Up

To ensure that your policy is effective, you should focus on three steps: investigation; documentation; and follow-up. Establish a relatively flexible investigative process, as well as thorough documentation and follow-up procedures that can be

used in each case. Your school's sexual harassment policy should also set out fair and comprehensive grievance procedures.

"Investigate, and Do It Well"[31]

"The specific steps taken in investigation will vary depending on the nature and source of the complaint, school size, etc., but all investigation should be prompt, thorough, and unbiased."[32] In all cases, provide assurance that your school will take proper steps to prevent and correct the situation.[33]

1. *Heed all complaints, including rumors.* Ignoring or dismissing a valid complaint can lead to individual liability.[34] Also, knowingly allowing discrimination to continue is a breach of your legal duty to protect students.[35] Do not dismiss rumors or other indirect modes of notice (flyers, news media, etc.). Depending on the pervasiveness of the alleged conduct, these indirect forms of notice can constitute constructive notice.[36] In light of the "known or should have known" standard for notice,[37] leave no stone unturned.

2. *Strive for resolution that is fair.* Assign unbiased investigators. Inform the parties involved (and parents of those parties) of the allegations against them. Conduct separate interviews if necessary.[38] In some cases, it may be helpful to assign interviewers that are the same sex as the victim.[39] Give both sides an opportunity to present witnesses. As an interim measure, you may want to separate the students (i.e., place them in different classes) until the matter can be resolved.[40] Always keep students informed of the status of their complaints.

3. *Be tough, but flexible.* Include a voluntary or informal means for resolving complaints, such as Alternative Dispute Resolution (ADR).[41] Keep in mind, however, that you should not require a student to work directly with an alleged harasser, absent adult supervision, to resolve the problem.[42] Additionally, a student has the right, at any time, to end the informal process and go forward with a formal complaint.[43] Inform students of this option. Finally, keep in mind that mediation (even if voluntary) may not be appropriate in criminal conduct cases (i.e., sexual assault).[44]

4. *Respect Confidentiality.* A victim of harassment may sometimes request that nothing be done, or that the matter be kept confidential in some other way. In response to such a request, explain to the victim that Title IX prohibits retaliation for complaints.[45] This may calm a victim who fears the harassment will escalate if the complaint is made public. Also, let the victim know that his or her request to keep the matter confidential may limit your ability to respond appropriately to the behavior.[46] Above all, offer any assistance that you can under the circumstances. Finally, if the conduct is criminal, you must report the complaint to the proper law enforcement authority.[47]

(FERPA: With respect to confidentiality concerns stemming from the Family Educational Rights and Privacy Act (FERPA), make every effort to prevent public disclosure of names. At all times, the goal should be to "balance the victim's need for confidentiality against the rights of an accused harasser," while still performing your obligations under federal law.[48])

5. *Take Appropriate and Effective Corrective Action.* If your investigation indicates that harassment has occurred, take action immediately. If necessary, implement disciplinary measures. If the conduct is criminal, report the abuse to the appropriate law enforcement or state agency.[49] In any event, your response should comply with your legal duties.[50] The action taken must not only be reasonable and timely under the circumstances, but should also be age appropriate and effective.[51]

Document

It is extremely important that you document every step of an investigation. Good records may illuminate a pattern, practice, or otherwise pervasive situation among particular students. Additionally, unquestionable documentation can be a major ally if a lawsuit is brought against you.

Follow-Up

Follow-up is one of the most important phases of the enforcement process. First, you should notify parties of the outcome of your investigation. As part of this step, you may want to include a reminder that retaliation against the complainant is prohibited by Title IX,[52] and will not be tolerated by the school. In the interest of fairness, you may also want to allow the involved students to appeal your findings.

Other Support Services. In some cases, your school may be required to remedy the effects of sexual harassment by providing counseling or other services such as tutoring.[53] In an interesting case, OCR found that a Massachusetts school district failed to protect six female students from sexual harassment, (including rape) by the captain of the football team.[54] "The... school district had provided home tutoring for the team captain when he came under court order to stay away from the female students, but when some of the female complainants asked to receive home tutoring, they were required to provide medical documentation of their inability to attend school."[55] As a result, OCR required the district to pay for counseling and summer school community college courses for the victims.[56]

The facts of this case vividly illustrate the importance of having in place an unbiased procedure for investigation, documentation, and follow-up. Your focus should be on preventing recurrence of the conduct and minimizing the burden on the student who has been harassed.[57] Accordingly, having a network in place to provide post-harassment support services is a praiseworthy effort toward achieving that goal.

CONCLUSION

Putting It All Together, A New Era

If one thing is clear from the flurry of litigation on the subject, combating peer sexual harassment in schools will not be easy. However, a systematic and diligent approach to the problem focusing on recognition, prevention, and enforcement, will facilitate the process of elimination. As educators and administrators, your goal in this new era should be to create a safe learning environment where students appreciate differences and understand the value of diversity. You should recognize that values, behavior, expectations, and rewards have changed." Acknowledge that students have changed. And, of course, appreciate the reality that your legal responsibilities have changed as well.

For additional information on student-to-student sexual harassment, contact:

- Dept. of Education, Office for Civil Rights, Customer Service Team, 330 C Street, S.W., Washington, D.C. 20202. Tel: (202)205-5413, Fax: (202)205-9862. Internet: www.ed.gov; E-mail: OCR@ed.gov.; and/or
- National School Boards Association, 1680 Duke Street, Alexandria, Va. 22314. Tel: (703)838-6722, Fax: (703)683-7590. Internet: www.nsba.org; E-mail: info@nsba.org.

ENDNOTES

1. "Sexual Harassment: A Guide for Faculty, Staff, and Students," citing Equal Employment Opportunity Commission (EEOC) Guidelines on Sexual Harassment. (Knoxville: University of Tennessee, 1996).
2. *Id.*
3. *Id.*
4. Office for Civil Rights,"Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties" (Washington, D.C.: Office for Civil Rights, U.S. Department of Education, 1997).
5. *Id. But see* Oncale v Sundowner Offshore Services Inc. (83 F.3d 118) (holding that Title VII does not protect against same sex harassment in the workplace). The Supreme Court has agreed to hear the case, which may have implications for school cases involving same sex peer sexual harassment. *See* Education Daily Special Supplement, August 1, 1997. "Sexual Harassment, Bias Cases Die on the Vine." Alexandria, Va. : Capital Publications, Inc.
6. Dean L. Webb, Kay H. Hunnicutt, and Arlene Metha, "What the Schools Can Do To Combat Student-to-Student Sexual Harassment" Arizona State University, Division of Educational Leadership & Policy Studies, 1996 citing Nan Stein, "Sexual Harassment in School: The Public Performance of Gendered Violence," Harvard Education Review 65 (1995): 145–62.
7. *See* Nabozny v Podlesny, Davis, Blauert, et al. 92 F.3d 446 (7th Cir. 1996). *Also see* OCR, *supra.*
8. *Id.*
9. OCR, *supra.*
10. *Id.*
11. *Id.*
12. OCR, *supra*, describing an incident in North Carolina involving Jonathan Prevette, a 6-year-old boy who was reprimanded under his school's sexual harassment policy for kissing a girl in his class on the cheek. The school district later described the behavior as simply a violation of the school's general conduct code. See *Education Week*, March 19, 1997) "ED Issues Guidance on Sex Harassment of Students." Alexandria, Va.
13. OCR, *supra.*
14. *Id.*
15. *Id.*
16. *Id.*
17. Rowinsky v Bryan Independent School District, 80 F.3d 1006 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 165 (1996).
18. Canutillo Independent School District v Leija, 101 F.3d 393 (5th Cir. 1996) (holding that school was not responsible for sexual molestation of second grader by a teacher because the parent, following school handbook procedure, only notified the child's homeroom teacher of the assault).
19. OCR, *supra.*
20. *Id. Also see* Davis v Monroe County Board of Education, 74 F.3d 1186 (11th Cir. 1996) (holding that a public school can be held liable under Title IX for failing to stop peer harassment that had been reported to the school). *But see* Rowinsky v Bryan, *supra.*
21. OCR, *supra.*
22. Davis v Monroe, *supra.*
23. OCR, *supra. Also see* 20 U.S.C. § 1681 *et seq.*, as amended; 34 CFR 106.1, 106.31(a)(b).
24. OCR, *supra.*
25. Webb, Hunnicutt, and Metha, *supra.*
26. *Id.*

27. Office for Civil Rights, "Sexual Harassment: It's Not Academic" (Washington, D.C.: U.S. Dept. of Education, Office for Civil Rights, 1988).
28. OCR, 1997.
29. Webb, Hunnicutt, and Metha, *supra*.
30. OCR, 1997.
31. *McGrath's Educator's Newsletter*, 1(1996), "Sexual Harassment Investigation: Do It Well or Pay the Price."
32. OCR, 1997.
33. *Id.*
34. Davis v Monroe County, *supra*.
35. OCR, 1997.
36. *Id.*
37. Davis v Monroe County, *supra*.
38. Webb, Hunnicutt, and Metha, *supra*.
39. *Id.*
40. OCR, 1997.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. OCR, 1988.
46. *Id.*
47. OCR, 1997.
48. *Id.*
49. Webb, Hunnicutt, and Metha, *supra*.
50. *Id.*
51. OCR, 1997.
52. *Id.*
53. OCR, 1997. *Also see* Dean, Hunnicutt, and Metha, *supra*.
54. *Id.*
55. *Id.*
56. *Id.*
57. OCR, 1997.
58. A Report of NASSP in partnership with the Carnegie Foundation for the Advancement of Teaching on the high school of the 21st Century. Reston, Va.: National Association of Secondary School Principals, 1996.

This Legal Memorandum was prepared by ***Kelley R. Taylor****, Program Specialist, Office of General Counsel, National Association of Secondary School Principals.*

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